

**INSTITUTIONAL SUPPORT
TO
THE MALAWI MINISTRY OF TRANSPORT

CIVIL AVIATION

LEGAL FRAMEWORK**

Submitted to:
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SUMMARY OF FINDINGS AND RECOMMENDATIONS: CIVIL AVIATION

The regulations made under the Aviation Act conflict with the stated NTP objective of market liberalization in domestic air services and should be repealed to deregulate scheduled domestic and non-scheduled international and domestic air services prior to the privatization of Air Malawi. In the case of scheduled international services, adequate regulatory powers are lacking, due to an over-reliance on international air services agreements as regulatory instruments. Licensing of international scheduled services should be introduced in line with international practice to introduce reciprocity and provide a non-interventionist regulatory mechanism in relation to carrier safety. The Act generally provides an adequate general framework for safety regulation by vesting sufficient powers in the Minister to make appropriate regulations. However, it is inadequate in terms of an adequate regulatory framework for private aerodrome operations or commercialized air traffic and navigation services and requires supplementation to introduce appropriate safety regulation and tariff deregulation. Both the Act and regulations generally require revision to introduce regulatory practices consistent with a more commercialized environment and to harmonize the Act and regulations with the legislation of other countries relevant to Malawi's civil aviation sector. Such revision should, if possible, be undertaken by the UNDP-funded study which has the object, amongst others, to revise Malawi's civil aviation legal framework.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
1. Deregulate scheduled domestic and international and domestic non-scheduled services and regulate market entry only on the basis of safety licensing.	Existing licensing provisions in the Aviation Act (AA) conflict with NTP objective of promoting liberalizing market entry and deregulating fares.	Repeal Aviation (Air Transport Licensing) Regulations in so far as they apply to domestic scheduled and international and domestic non-scheduled services (See 2.4.2).	Deregulation is not a precondition for privatization of Air Malawi. However, deregulation should preferably be introduced at the earliest opportunity to ensure that a stable policy environment is in place prior to privatization. Amendments can be easily effected as only regulation amendments are involved.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
2. License international scheduled services	Malawi does not apply licensing requirements where international air services agreements have been concluded. As agreements only apply between governments, they are not an appropriate regulatory tool in respect of airlines. Moreover, Malawian carriers generally are required to be licensed in foreign jurisdictions. Malawi is both losing potential revenue and disadvantaged by the lack of reciprocity. A basic form of licensing, which should be non-interventionist, should be introduced which entails verification of a foreign carrier's license in its home state as well as compliance with safety requirements. This will provide a basic regulatory tool to address situations of non-compliance, through the suspension or withdrawal of a licence and bring Malawi in line with international practice.	Amendment of ATL regulations (See 2.4.1).	Amendments are not a priority, but can easily be effected as only regulation amendments are involved.
3. Expand the authority of the Minister to conclude appropriate international air services agreements .	Provisions mandating the Minister to conclude agreements should be expanded to provide for principles of reciprocity and non-discrimination to be applied and to allow maximum flexibility in terms of the potential subject-matter of agreements. Provision should also be made for a flexible incorporation procedure which obviates the need for cumbersome parliamentary ratification procedures and can contribute towards the harmonization of Malawi's aviation legislation with those of other countries.	Amend AA (See 2.4.1).	Amendments are not a priority, but should preferably be introduced as a part of a legal reform package along with the recommendations contained in 4. below.
4. Expand capacity to assess and implement ICAO Standards and Recommended Practices (SARPs) and empower Director: Civil Aviation to issue SARP-related directives.	Reg 64 authorizing the Director to issue directives is probably <i>ultra vires</i> .	Repeal of Reg 64 (Air Navigation) (AN) regs and amendment of AA to introduce provisions similar to Reg 64 in the Act (See 3.4).	The AA and AN regs should be amended as a priority to ensure that the Director is able to set standards and adequately regulate all aspects of aviation safety.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
5. Establish licensing procedures for aerodromes based only on safety criteria	Current AN regs potentially create scope for economic regulation, eg with reference to rates and conflict with NTP objectives to establish autonomous airport authorities operating on commercial principles. Regulations are not specific with regard to need for safety licensing.	Amend AN reg 61 (See 4.4)	Priority issue prior to commercialization / privatization of any aerodromes.
6. Empower Director to set minimum standards for commercialized ATNS based on ICAO SARPs and monitor compliance.	Commercialization of ATNS will require appropriate regulatory oversight by civil aviation authorities.	Amend AA and AN regs (See 5.4)	Priority issue prior to commercialization / privatization of ATNS services.
7. Revise regulatory procedures in AA and regulations to introduce regulatory approach consistent with NTP objectives	The regulatory approach in the AA and regulations display numerous inconsistencies and are not appropriate to a commercialized aviation environment.	Amend AA and AN regs (See 6.4)	Should be addressed as part of ICAO legislation review study.

1. BACKGROUND

1.1 The legal framework for the Malawi civil aviation sub-sector comprises:

- C the National Transport Policy, 1998 and the Privatization Policy;
- C civil aviation-specific legislation:
 - S the Aviation Act, 1970 and its subsidiary legislation;
 - S Carriage by Air Act, 1981; and
 - S National Airline Act, 1967;
- C Aviation Regulations, 1970 comprising:
 - S Aviation (Air Navigation) Regulations;
 - S Aviation (Air Transport Licensing) Regulations;
 - S Aviation (Fees) Regulations;
 - S Aviation (Aerodromes) Regulations;
 - S Aviation (Rules of the Air and Air Traffic Control) Regulations;
 - S Aviation (Smoke) Regulations;
 - S Aviation (Aircraft Performance) Regulations; and
 - S Aviation (Aerodrome Charges) Regulations;
- C generally applicable legislation, namely:
 - S the Public Enterprises (Privatization Act), 1996;
 - S Environmental Management Act, 1996; and
 - S the Competition and Fair Trading Act, 1998; and
- C the SADC Protocol on Transport, Communications and Meteorology.

1.2 AVIATION ACT, 1970

The Aviation Act (AA) is the principal regulatory legislation applicable to the civil aviation sub-sector. Essentially, it provides for the control, regulation and orderly development of aviation and its services within Malawi. It comprises only 19 sections that address:

- C section 1: short title;
- C section 2: interpretation;
- C section 3: responsibility for administration of Act;
- C section 4: powers of Minister;
- C section 5: declaration of land subject to control;
- C section 6: emergency powers;
- C section 7: dangerous flying, etc;
- C section 8: general control of buildings;

- C section 9: control of buildings near aerodromes;
- C section 10: closure of highways, etc;
- C section 11: trespass by aircraft;
- C section 12: trespass on aerodromes;
- C section 13: action for nuisance;
- C section 14: aircraft and spares not liable to seizure;
- C section 15: carriage of mail in aircraft;
- C section 16: offences on Malawi aircraft;
- C section 17: service of notices or orders;
- C section 18: state aircraft; and
- C section 19: regulations.

1.3 AVIATION REGULATIONS

1.3.1 Aviation (Air Navigation) Regulations (AN)

These regulations contain general conditions related to the privilege of flying across Malawi territory, the purposes for which aircraft may do so, the categories of and procedures for the registration of aircraft and the requirements in respect of permissible markings on aircraft that fly in Malawi. The regulations require various certificates (airworthiness, maintenance and compliance) to be issued in respect of aircraft, equipment and radio equipment. Provisions set out the criteria and procedure for these certificates as well as for licences issued to aircraft maintenance engineers and licences and ratings of flight crew. The part dealing with the operation of aircraft sets out the duties of operators, duties in respect of radio apparatus and flight recorders and certain categories of goods. Furthermore, the regulations contain procedures to control fatigue levels of flight crew, requirements pertaining to documents and records and their preservation, and air traffic control provisions. Air routes and airways are designated and licencing requirements for aerodromes set out. General provisions also include penalties and a liability exemption.

1.3.2 Aviation (Air Transport Licencing) Regulations (ATL)

These regulations govern licences and provisional licences in respect of scheduled journeys. Procedures, criteria and prescribed forms in respect of licence applications are provided for, and these provisions include revocation or surrender of licences. Provision is made for publication of the Minister's decisions. Operation without a permit is likewise restricted under these Regulations. Permit fees are set out and general provisions include permission to proceed for an offence against the Regulations.

1.3.3 Aviation (Fees) Regulations (AF)

These regulations set out and impose landing fees in respect of scheduled aerodromes. Annual landing permits are to be issued relating to such scheduled aerodromes. Certain classes of aircraft which are listed are exempted from landing fees. Housing and parking fees are regulated and the procedures applicable to payment of fees are set out. The Minister has a discretion to exempt certain classes of aircraft from payment of fees. Fees payable in respect of certificates, licences, examinations, tests etc. are also regulated.

1.3.4 Aviation (Aerodromes) Regulations (AE)

These regulations govern aerodromes licenced for public use or any Government aerodrome. Prohibited acts in relation to aerodromes are listed and safety precautions that apply on an aerodrome are set out. The conditions and procedures for removal of any person suspected of having contravened or about to contravene these Regulations are included and the penalties imposed are set out.

1.3.5 **Aviation (Rules of the Air and Air Traffic Control) Regulations (RAATC)**

These regulations cover the operation and safety responsibilities of the commander in respect of all aircraft within Malawi and all Malawi aircraft wherever they may be. Provisions prescribe standards for lights and other signals to be fitted to aircraft and for the display of lights by aircraft at night. General flight rules are covered and these include the minimum information (meteorological and otherwise) which the commander must have at hand before commencement of a flight. Visual flight rules and instrument flight rules provisions guide the commander in respect of conditions and procedures to be observed. Aerodrome traffic rules, which regulate for example access to areas of the aerodrome used by aircraft and the right of way of aircraft on the ground, are set out. Aerodrome signals and markings are described with the aid of illustrations and the meanings of light signals and marshalling are set out in table format.

1.3.6 **Aviation (Smoke) Regulations (AS)**

These regulations cover substances or particles which obscure visibility. They impose restrictions on causing smoke within a specified area surrounding an aerodrome and set out procedures and criteria for permission to create smoke in that area. Offences, penalties and exemptions are also regulated.

1.3.7 **Aviation (Aircraft Performance) Regulations (AP)**

These regulations apply to public transport aeroplanes for purposes of reg. 26 of the Air Navigation Regulations. Aeroplanes are to be classified into performance groups. Specific weight and performance standards apply with respect to these aeroplanes, and those having no performance group classification have also been covered.

1.3.8 **Aviation (Aerodrome Charges) Regulations (AC)**

These Regulations impose and specify a passenger service charge, entrance charges, exemptions and the manner of payment of charges. A penalty for failure to comply is provided for.

1.3.9 **Aviation (Investigations of Accidents) Regulations (IA)**

These Regulations relate to civil aviation only and apply to accidents arising out of or in the course of air navigation which occur to any civil aircraft in or over Malawi, or elsewhere to aircraft registered in Malawi. Responsibility for notification, notification forms and procedures and removal of damaged aircraft and persons from the aircraft are regulated. Persons may be appointed as inspectors. The criteria and procedures in respect of the investigation, reports, public inquiries, offences and penalties are also covered.

1.4 **CARRIAGE BY AIR ACT, 1981**

This Act gives effect to the Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage by Air), the Hague Protocol to amend the Warsaw Convention, and the Convention supplementary to the Warsaw Convention (referred to as the Guadalajara Convention).

The Act provides that any amount to be paid by the carrier as damages must be converted into Malawi currency and contains provisions relating to proceedings instituted for damages in respect of the death of a passenger. Liability of the carrier for personal injury and death is set out. Certain sums are not to be taken into account in assessments of damages. Contributory negligence by a passenger or consignor is a factor to be taken into account for the purpose of

assessing damages. Other provisions relate to jurisdiction and categories of aircraft excluded from the application of the Convention.

1.5 NATIONAL AIRLINE ACT, 1967

This Act provides for the dissolution of the Central African Airways Corporation (CAAC) and the transfer of the assets and liabilities of the CAAC to Air Malawi, which is established as a company incorporated under the Companies Act.

1.6 ENVIRONMENTAL MANAGEMENT ACT, 1996

This Act makes provision for the protection and management of the environment and the conservation and utilisation of natural resources. Promotion of sustainable utilisation of natural resources is one of the general guiding principles. It confers a right to a decent environment on inhabitants, setting out the criteria and procedures for complainants who wish to commence action. The Minister acts in consultation with lead agencies to realise the objectives of the Act. Institutional provisions include the appointment of the Director of Environmental Affairs, establishment of the National Council for the Environment, and the Technical Committee on the Environment and the Act sets out the duties and responsibilities of these organs.

The Act sets up an Environmental Fund and vests the Fund in the Minister. Offences and penalties are regulated and the Act also contains a provision conferring immunity against legal proceedings on officials in respect of actions undertaken in good faith under the terms of the Act.

1.7 PUBLIC ENTERPRISES (PRIVATISATION) ACT, 1996

This Act establishes the Privatisation Commission as the sole authority to implement the privatisation of direct or indirect government ownership of any enterprise. The Commission reports directly to the Minister of Public Enterprises. Privatisation occurs in terms of a divestiture sequence plan which identifies those enterprises with a commercial orientation which will be the subject of privatisation. Enterprises not considered to have a commercial orientation will revert to the control of the appropriate ministry. As part of this process, the Act also mandates the commercialisation of any government department.

1.8 COMPETITION AND FAIR TRADING ACT, 1998

The Act establishes the Competition and Fair Trading Commission with the broad functions of regulating, monitoring, controlling and preventing any act which adversely affects competition or fair trading. The Act prohibits anti-competitive trade practices and permits the Commission to control mergers and takeovers and regulates the relationship between suppliers of goods and service and consumers. For the purpose of promoting a fair competition regime, the Commission may conduct investigations and convene hearings and generally take such action as it deems necessary to achieve the objects of the Act.

1.9 The remainder of the report contains:

- C a **policy narrative** of the current provisions of the NTP and the SADC Protocol;
- C a **status quo narrative** of the existing legal framework addressing:
 - S market liberalization: air services;
 - S air safety;
 - S aerodromes;
 - S air traffic and navigation services; and
 - S the regulatory system.

- C a **status quo analysis** of the existing legal framework in order to assess the degree to which there is convergence or divergence between the NTP, the Protocol and the current Malawi legal framework; and
- C **recommendations** for the amendment of the legal framework in order to support effective implementation Malawi's policy objectives and strategies.

- 1.10 Various amendments to both the AA and regulations are recommended in this report. The analysis shows that the AA and supporting regulations provide an adequate framework of safety rules, but in several respects the legislation does not sufficiently support the regulatory responsibility of the Directorate: Civil Aviation. A number of deficiencies have been identified and recommendations to rectify these have been proposed. However, due to the scope of the study, a comprehensive assessment leading to the formulation of detailed legislative amendments has not been possible. It appears that a more thorough review of the AA and regulations is required to assess the extent and degree of legislative revisions which is required to provide an enabling framework of legal rules applicable to this sub-sector. This would not require a redrafting of the entire Act or regulations, but rather a re-organization to ensure a more cohesive body of rules which can be effectively applied. Various recommendations are made in this report with regard to priority issues, which have been formulated in sufficient detail that they may serve as **drafting guidelines** for the preparation of appropriate legislative amendments.

2. MARKET LIBERALIZATION: AIR SERVICES

2.1 POLICY

2.1.1 The NTP adopts the objectives to:

“develop an air transport regime that is able to make full use of Malawi’s aviation infrastructure for the promotion on a sustainable basis, of tourism, airfreight, business travel and air transport activities”;

“enhance the provision of orderly, safe and reliable and efficient services and encourage private sector participation in the aviation industry”;

and identifies the following strategies in pursuance thereof:

“liberalise entry into the air transport market”;

“restructure and privatise the national airline ... where feasible”;

“introduce support measures and incentives to carriers proposing to provide scheduled services on thin domestic routes” and

“deregulate domestic air fares and rates”.

2.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to encourage:

“improved diversity of services and provision of services on a competitive bid basis through the promotion of fair and healthy competition between services providers” (article 2.4(l);

“broad-based private investment in transport infrastructure and service provision, and the restructuring of public enterprises to achieve full commercial autonomy” (article 2.4(c));

“gradual liberalization of intra-regional air transport market for the SADC airlines” (article 9.2(a); and

“the economic and concomitant institutional restructuring of the SADC airlines, airports and the provision of air traffic and navigation services ... “(article 9.2(c)).

2.2 STATUS QUO NARRATIVE

2.2.1 The AA provides for **economic regulation** of entry into the air services market. However, the regulatory approach differs depending on whether a service is scheduled or non-scheduled or international or domestic.

2.2.2 Scheduled international air services

Scheduled international services may, in terms of the AA, be regulated through a licensing procedure. However, in practice, licences are not issued to international carriers and such services are regulated solely in terms of the international air services agreements. An airline is designated in terms of the applicable agreement and, upon designation, no further licensing is required. The rationale for this practice is that designation is regarded as the equivalent of licensing. However, in practice, many states do not apply reciprocal treatment to Malawian carriers and do require licensing, subsequent to designation. It is noteworthy, moreover, that the AA contains no prohibition on multiple designation, ie a foreign state may designate more than one carrier to serve a route between Malawi and such state.

2.2.3 Scheduled domestic air services

The primary regulatory mechanism for market entry to scheduled domestic air services is a **licence** issued by the Minister. The following provisions of the Aviation (Air Transport Licensing) Regulations (ATL Regs) are relevant:

ATL Reg:

- C 5: restriction on operation without a licence;
- C 6: grant of a licence by the Minister;
- C 7: applications for licences;
- C 8: publication of applications;
- C 9: objections or representations;
- C 10: power of the Minister to appoint a tribunal;
- C 11: composition, powers, rights and privileges of a tribunal;
- C 12: hearings of a tribunal;
- C 13: notice of a hearing;
- C 14: grant of short-term special licences;
- C 15: period of licence;
- C 16: grant of provisional licences;
- C 17: publication of the Minister's decisions;
- C 18: revocation or suspension of licences;
- C 19: surrender of licences; and
- C 20: fees for licences.

Applicants must apply to the Minister who must publish prescribed licence particulars in the Gazette. Amongst others, the application should state details of routes to be plied and freight and passenger rates to be charged. Objections to such application may be lodged by a **Government officer** acting on the **instructions of the Minister**, an existing air transport

operator or an existing aerodrome owner.

After the period for lodging an objection has expired, the Minister has to consider the application as well as any objections lodged (including those objections lodged on his instruction!) The Minister has a discretion to appoint a **tribunal** to assist him in the process of consideration and may instruct such tribunal to conduct an inquiry or hearing either publicly or in camera depending on ministerial discretion. The tribunal, which may be appointed for a general period or for a specific application only, consists of a public servant and such other assessors as the Minister may appoint.

The tribunal has all the powers of a commission of inquiry under the Commissions of Inquiry Act and is empowered to conduct hearings in respect of the licence application. These hearings must be held in public with the applicant and any objector being given sufficient notice thereof and an opportunity to state their case (It may be noted that in practice, no tribunal has ever been appointed by the Minister).

After considering any objections received, the Minister has a **discretion** to grant a licence, on such conditions as he deems necessary. The AA lays down no criteria in terms of which the licence may be granted. However, the AA does provide for at least 3 obligatory conditions, namely:

- C the holder of a licence and any person having a financial interest in the business of the holder, may not require any person to refuse booking facilities to any other holder of a licence or to grant such facilities to such holder on onerous terms;
- C the holder of a licence must perform all reasonable services as determined from time to time by the Postmaster General and remuneration is on the basis of contract; and
- C any dispute as to remuneration with the Postmaster General is subject to arbitration in terms of the Arbitration Act.

The Minister has a discretion to determine the period of validity of the licence, but this may not exceed 5 years. The prescribed particulars of all the Minister's decisions must be published. The AA provides the conditions under which the Minister may revoke or suspend a licence and also provides for the authority to levy licence fees in the format determined by the Minister. A licensee is obliged upon ministerial discretion to submit information which the Minister may require on the air services undertaken in terms of the licence.

Finally, it may be noted that the regulations expressly exempt an applicant from having to disclose any information of a financial nature (or information which is otherwise confidential) to any person other than the Minister or Director.

2.2.4 Non-scheduled international and domestic air services

In the case of both non-scheduled international and domestic air services, market entry is regulated through a **permit** which is issued by the Director. The following provisions are relevant:

ATL Reg:

- C 23: restriction on operation without a permit;
- C 24: grant of permits;
- C 25: application for permits;
- C 26: powers of Director;
- C 27: revocation or suspension of permits; and
- C 28: fees for permits.

The Director has an absolute discretion to issue such permits and to specify conditions for the use thereof as he/she thinks fit. There is no indication as to what criteria apply. Eg, one of the operative conditions formerly applied to permits issued in the case of international non-scheduled air services where Air Malawi could not reciprocate a service, was that the carrier from the other country applying for a permit, must pay a royalty to Air Malawi. However, there is no express provision in the AA or regulations for this practice, and in the meantime it has been discontinued.

Permit applications for periods in excess of 30 days must be published in at least one Malawian newspaper and the *Gazette* and are dealt with as if they are applications for licences. In respect of these applications, the Director is empowered to receive objections and appoint a tribunal as described above.

In the case of Malawi air service operators, aircraft registration is required over and above a licence or a permit to be able to undertake air services. The Chief Civil Aviation Officer is responsible for registration of such aircraft and has a broad discretion to refuse registration where this would not be in the public interest (in practice, the Director and Chief civil Aviation Officer are the same person and both designations are interchangeably in the regulations).

2.2.5 Air Malawi

In common with other transport sub-sectors, the aviation legislation does not provide a framework for the commercialization or potential privatization of Air Malawi. As a wholly-owned government company, Air Malawi falls under the definition of government enterprise which can be privatized in terms of PEPA.

2.3 STATUS QUO ANALYSIS

2.3.1 Scheduled international air services

The designation of carriers in terms of the various bilateral agreements which Malawi has concluded, is being used as an alternative to licensing as a potential regulatory mechanism. **In this regard, it appears worthwhile to apply the requirement of licensing, for which authority exists in the AA, in so far as it provides the opportunity for the authorities to verify that a carrier does comply with requirements for designation as set out in the air services agreements and to verify compliance with safety requirements.** This approach is based on the fact that licensing of international carriers is a fairly common practice elsewhere as well as being a source of revenue. Malawi would, therefore, largely be following international trends. Moreover, licensing is a process which Malawian carriers would generally undergo in flying to foreign destinations and can be justified on the grounds of reciprocity. Such a licensing process is not intended to impose any additional hurdles, nor need it be restrictive or onerous. It could, for example, merely take the form of a verification that a foreign carrier is licensed in its state of origin and has the required safety certificates. **Introducing this approach would not require any legislative amendment, but could be undertaken through amendments to the ATL Regulations.**

Malawian law recognizes the principle that the executive has the power to conclude treaties (which would include the air services agreements under discussion). However, the AA could be improved by expressly empowering the Minister to conclude air services agreements and specifying the areas to be addressed in such agreements. Further detail is provided in 2.4 below.

2.3.2 Scheduled domestic air services

The current approach appears to be premised on the assumption that access to the market

may be regulated on economic grounds. This is apparent from the fact that existing service providers may lodge objections. The high degree of regulatory discretion, ie the fact that the regulations do not lay down any grounds for the Minister's evaluation of application, create the potential for significant intervention in the market. This potential is compounded by the extra-ordinary power of the Minister to direct one of his own officials to object to an application. The fact that applicants are required to provide details of rates, seems to imply that the Minister may also dictate the amount of such rates.

The current licensing procedure is clearly in direct **conflict** with the NTP objective to liberalise entry to the air transport market and to deregulate domestic air fares and rates.

2.3.3 Non-scheduled international and domestic air services

The NTP does not contain a specific policy objective with regard to non-scheduled services. However, in line with the approach to scheduled services, it appears that the regulatory approach is also premised on economic regulation. This can be deduced, eg from the fact that provision is made for an objection procedure.

Traditionally, once a policy decision has been taken in favour of market liberalization, such liberalization can be implemented more readily with regard to **non-scheduled services**. The civil aviation authorities have already taken steps in this direction, eg in reducing the period required for notice to be given. It is presumed, therefore, that the NTP objective to liberalize market entry, also includes non-scheduled services.

2.4 RECOMMENDATIONS

2.4.1 Scheduled international air services

IT IS RECOMMENDED THAT:

- C Malawi should reimpose the requirement of **licensing** of international carriers, including express acceptance of the principle of multiple designation. This requires the repeal of regulation 3 (a) of the ATL Regulations and well as additional regulations addressing, amongst others:
 - S information to be supplied by the applicant, eg licences issued in the carrier's home state; and
 - S submission of proof of safety certification.
- C The AA be amended to include provision **authorising** the Minister to conclude international air service agreements. Such provision should entrench the principles of:
 - S reciprocal licensing;
 - S multiple designation;
 - S reciprocity;
 - S similarity of treatment; and
 - S non-discrimination.

Provision should also be made for flexible incorporation procedures. These could follow the approach that the Minister is required to table such agreements in Parliament and in the absence of a resolution adopted by Parliament to the contrary within a specified time period (eg 30 days), Parliament will be deemed to have ratified the agreements. An alternative procedure has also been adopted in some Malawi legislation (ie the Forestry Act, 1996, the Fisheries and Conservation Act, 1997 and more recently in amendments to the National Parks and Wildlife Act, 1997) providing

for incorporation of international agreements in domestic law. This procedure authorizes the Minister, by order published in the *Gazette*, to specify measures for the proper implementation of relevant provisions of any convention (which is defined in the Interpretation Act as any bilateral or multilateral international agreement) to which Malawi is a party (the first of such orders is currently under consideration by the Attorney-General's chambers). This approach is interpreted as complying with the provisions of Sec 211 of the Constitution in terms of which an Act of Parliament is required to ratify any convention which is intended to have domestic legal force.

Agreements and amendments thereto should be submitted to ICAO for registration and ICAO should be notified of any termination of agreement.

- C **Essential provisions** of international air services agreements should be provided for in the AA. The AA should be amended to provide that any agreement concluded by the Minister incorporate the provisions on the following matters:

- S designation of airlines:
 - C permitting each contracting party to an air services agreement to designate more than one airline to serve a route;
 - C permitting designation for an unlimited period, but providing that designation may be withdrawn if a designated airline does not comply with all licensing conditions or if a service is unsatisfactory or insufficient or if a service is terminated for longer than a specified period;
 - C preventing the subcontracting of designation by one airline to any other airline (provided that any joint operations are not construed as subcontracting).
- S traffic rights (including a provision to facilitate further liberalisation on the basis of reciprocity);
- S rates and fares (including the freedom to set rates and fares, obligations of the operator to notify the Director of proposed rates and fares);
- S timetables;
- S recognition of certificate and licences;
- S compliance with safety standards (including obligations to recognise certificates and licences issued in conformity with the ICAO standards);
- S entry into force;
- S procedures to be followed to amend an agreement;
- S the rights of the parties thereto in the event of substantial breach thereof;
- S the termination of an agreement or of any relevant provision thereof; and
- S the procedure to be followed in the event of a dispute regarding the interpretation or application of an agreement.

2.4.2 Scheduled domestic air services

IT IS RECOMMENDED THAT:

- C Entry to the scheduled domestic air services market be **deregulated**, subject only to compliance with safety requirements. This implies:
 - S The ATL regs in so far as they apply to domestic services should be **repealed**, in order to discontinue the licensing of such services.
 - S Market entry should be governed solely by compliance with **safety** requirements. In this regard, the need for safety regulation appears to be adequately met by the AN regs.
- C Implementation of deregulation will also require revision of the AA to remove references to **licensing**. In particular, Sec 19(2)(p) of the AA which authorizes the Minister to make regulations regarding the licensing of air services, should be repealed.

2.4.3 Non-scheduled international and domestic air services

The recommendations made under 2.4.2 also apply in this case.

3. AIR SAFETY

3.1 POLICY

3.1.1 The NTP adopts the objectives to:

“attain and maintain a ... civil aviation environment that ensures safety in accordance with national and international standards” and

“to promote the development of a safe .. aviation industry” and to this end adopts the following strategies:

“ensure that air transport is operated in a safe ... environment ... and enhance sustained aviation security in all air transport activities”

“ensure the compliance with International Civil Aviation Organisation Standards in the design, construction and operation of airports and associated facilities”;

“ensure a safe operation... of airports”;

“undertake environmental impact assessments in all new airport projects”; and

“strengthen the safety enforcement provisions in the Aviation Act”.

3.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to:

“facilitate the development of safe, reliable and efficient air transport services in accordance with the ICAO SARPs ...” (article 9.1); and

“promote compliance with ICAO SARPs” (article 9.2(g)).

3.2 STATUS QUO NARRATIVE

3.2.1 The following provisions of the Aviation (Air Navigation) Regulations (AN Regs) are relevant:

AN Reg:

- C 3: aircraft to be registered;
- C 4: registration of aircraft;
- C 6: certificate of airworthiness;
- C 7: issue and renewal of certificates of airworthiness;
- C 11: aircraft to be properly equipped;
- C 12: radio equipment of aircraft; and
- C 14: aircraft weight schedule.

3.2.2 All air service providers must comply with the following **basic safety requirements**; ie:

- C a valid **certificate of airworthiness** issued by the Director on the basis of specified criteria and after such flight trials as required (or one valid in terms of the law of the country in which the aircraft is registered);
- C such **equipment** as is prescribed in terms of the AN Regs (or the law of the country in which the aircraft is registered); and
- C such **radio equipment** as is prescribed in terms of the AN Regs (or the law of the country in which the aircraft is registered).

Malawian aircraft must, in addition, hold a **certificate of maintenance** and have been weighed in terms of the AN Regs. The Director currently maintains registers for licenses, permits and Malawi registered aircraft as part of his functions. However, there is no statutory obligation for such registers to be kept.

3.2.3 The AA acknowledges the primary importance of **ICAO Standards and Recommended Practices** (SARPs) and provides an enabling mechanism for the Minister to incorporate provisions of the Chicago Convention and any annex thereto by means of regulation. There is no indication as to who advises the Minister on the technical content of annexes. The Director is also empowered to issue directions to ensure the safety of aircraft or compliance with any ICAO SARP (AN Reg 64), although the AA contains no express authorisation to this effect.

3.2.4 Compliance by Malawi with the various ICAO SARPs varies. Areas in which compliance by Malawi legislative provisions is relatively good, are:

- C Annex 7 - Aircraft Nationality and Registration Marks; and
- C Annex 13 - Aircraft Accident and Incident Investigation.

3.2.5 The areas in which there is least compliance in Malawi legislation with the ICAO SARPs are:

- C Annex 3 - Meteorological Service for International Air Navigation;
- C Annex 4 - Aeronautical Charts;
- C Annex 10 - Aeronautical Telecommunications, Volumes I - V;
- C Annex 12 - Search and Rescue;
- C Annex 15 - Aeronautical Information Systems; and
- C Annex 16 - Environmental Protection.

3.2.6 In 1997, an ICAO Safety Oversight Mission found that Malawi was not implementing Annexes 1, 6 and 8, in particular:

- C **Licence and ratings for pilots (Annex I):**

Malawi's Air Navigation Regulations, Part III, Regulation 17 -18 do provide for the licencing of

aircraft crew, and in terms of the definition of “flight crew”, pilots are included. However, knowledge, experience, skills and flight instruction for the **commercial pilot licences** and **airline transport pilot licences** as required by the ICAO SARPs have not been established.

C **Flight radio telephone operator (Annex I):**

The ICAO SARPs provide for a licence for a “flight radio telephone operator”. Licences for this category of crew member is not dealt with specifically, but is covered under Regulation 17 of the AN Regulations. The same applies to “flight navigators” and “flight engineers”.

C **Licensing of air traffic controllers (Annex I):**

No regulations have been developed for the licensing of air traffic controllers, although a departmental manual on air traffic control is in use.

C **Medical provisions for licensing (Annex I):**

No regulations have been established for the conduct of medical examinations and for the assessment of medical reports.

C **Duties of flight operations officer / flight dispatcher (Annex I):**

The civil aviation authorities do not issue a flight operations officer / flight dispatcher licence nor have knowledge and experience requirements been established for flight dispatchers. Operators must establish the duties of the flight operations officer / flight dispatcher and include the same operations manuals.

C **Communication equipment (Annex I):**

The ICAO SARPs provide recommended practices for communication equipment. The AN regs deal with “Radio equipment of aircraft” (Reg 12) and with the “Operation of radio in aircraft” (Reg 31), but it is doubtful whether the existing provisions meet the SARPs requirements.

C **Flight preparation and in-flight procedures (Chapter 4, Annex 6, Part II):**

Although “Pre-flight action by commander of aircraft” is dealt with in the AN regs (Reg 28), all aspects of this SARP are not covered.

C **Hazardous flight conditions ((Chapter 4, Annex 6, Part II):**

Reg 7 of the Aviation (Rules of the Air and Air Traffic Control) Regulations deals with the “Reporting of hazardous Flight Conditions”, while Reg 27 of the AN Regs deals with weather conditions for foreign aircraft. Although there is a degree of compliance, all aspects of the SARP are not dealt with in the regulations.

C **International Operations: Helicopters (Annex 6, Part III):**

This part of the SARP is not dealt with at all.

C **Certificate of Airworthiness (Annex 8, Part II):**

Part II of the AN Regs provide for certificates of airworthiness for Malawi aircraft (Reg 6). However, Malawi needs to adopt a detailed and comprehensive airworthiness code. The SARP on the information to be contained in the certificate of airworthiness also needs to be implemented.

C **Operating Limitations and Information (Annex 8, Chapter):**

The ICAO SARPs prescribe operating limitations for loading. Loading limitations are also covered by Reg 25, (Part IV : Operation of Aircraft) of the AN Regs, under the heading “Loading - Public Transport aircraft and suspended loads”, but not to the extent required by the SARP.

3.3 STATUS QUO ANALYSIS

- 3.3.1 A complete assessment of the degree to which Malawi complies (or should comply) with ICAO SARPs falls outside the scope of this study. In terms of the recent study referred to above, priority attention should be given to ensuring full compliance with Annexes 1, 6 and 8.
- 3.3.2 The lack of compliance in certain areas with ICAO SARPs is presumably prompted by limited institutional capacity in the Directorate: Civil Aviation to evaluate the various SARPs and to initiate the required procedures to have them enacted. This points to a need to strengthen capacity to both evaluate and identify those SARPs appropriate to Malawian conditions and to ensure that they are enacted.
- 3.3.3 The current provisions contained in the regulations which give the Director the power to make SARPs-related directions is a **useful** instrument to incorporate ICAO rules in national legislation. However, in line with the general principle that subsidiary legislation (regulations) cannot grant wider powers than primary legislation (the Act), provision should be made for the Director to be expressly authorized in the AA to issue such directions.

3.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- C The AA be amended to expressly empower the Director to issue SARPs-related directions. This would entail that Reg 64 of the AN regs is repealed and that a provision similar to Reg 64 be inserted in the AA.

4. **AERODROMES**

4.1 POLICY

The NTP adopts the strategies to:

“provide and improve aviation infrastructure consistent with demand and available financing”;

“ensure compliance with International Civil Aviation Organization standards in the design, construction, and operation of airports and associated facilities”;

“establish where possible autonomous airport or civil aviation authorities to operate and manage airports and aviation equipment on commercial principles”;

“create an environment where investors can realise adequate returns on their investments”;

“institute and monitor maintenance programmes for both aerodromes and aviation equipment”;

“construct aerodromes where feasible”; and

“restructure and privatise ... airports where feasible”.

4.2 STATUS QUO NARRATIVE

4.2.1 Aerodrome safety

Aerodrome **safety** is regulated in terms of the AA and the AN Regs as follows:

AA: section:

C 4: powers of Minister

AN Reg.

C 61: licensing of aerodromes;

C 63: use of aerodromes; and

C 69: restriction of trading within Government aerodromes.

The AN Regs provide for **licensing** of aerodromes. However, the regulations do not stipulate which aerodromes need to be licensed. It appears that current practice is not to licence aerodromes under the control of the civil aviation authorities, which currently includes all aerodromes except 2 (Lilongwe and Makokola). Lilongwe airport is operated by Airport Developments Ltd which is a wholly state-owned company registered in terms of the Companies Act, while the airport at Makokola is under private management. Both the latter airports are licensed.

An aerodrome licence is issued by the Director, which confirms that the aerodrome is safe for use in respect of:

C the take-off and landing of passenger aircraft; and

C flying instruction.

The licensing procedure is not prescribed but the Director has a discretion to issue the licence subject to any economic or safety conditions. An aerodrome licensee may not contravene any licence condition. The regulations are not specific regarding the consequences of a contravention of a licence condition and do not spell out the circumstances under which a licence will be suspended or revoked.

4.2.2 Aerodrome services

Commercial airport **operations** are regulated by the AN Regs and the Aviation (Fees) Regulations (AF Regs). The relevant provisions of these regulations are as follows:

AN Reg:

C 61(3): enlargement of an aerodrome;

C 61(4): regulation of aerodrome charges; and

C 64: Director's power to give directions in respect of aerodromes.

AF Reg:

C 3: landing fees;

C 4: monthly rate;

C 5: housing fees;

C 6: parking fees; and

C 10: payment of fees.

The Minister regulates charges in respect of aerodromes specified by the Minister in a schedule to the regulations. These include landing, housing and parking fees in respect of the aerodromes at Chileka, Karonga, and Mzuzu amongst others.

Charges at licensed aerodromes are currently regulated by the Director. The Director has a

discretion to specify charges or maximum charges for:

- C the use of any a licensed aerodrome; and
- C any services relating to aircraft provided at such aerodrome.

This discretion extends to determining conditions for the provision of any charge-related service. The operator receives notification from the Director in writing and must ensure that this notice is exhibited within the aerodrome for the information of any interested party.

A licensed aerodrome operator is restricted from enlarging, reducing or altering the landing or manoeuvring area of the aerodrome. Where market conditions require this, written permission from the Director must first be obtained. The Director has a discretion to waive this requirement if the aerodrome is licensed for private use only.

Any person who wishes to trade, advertise or solicit business at any government aerodrome, needs a licence issued by the Chief Civil Aviation Officer. Airport transport operators are exempted from this requirement in terms of activities to solicit business and advertise air transport services. This exemption also applies to providers of goods and services required for the aircraft maintenance and operation.

4.3 STATUS QUO ANALYSIS

4.3.1 Aerodrome safety

With regard to aerodrome **safety**, the absence of licensing criteria requires the regulations to be supplemented to specify that the focus of licensing is purely on compliance with **safety** requirements. An alternative interpretation would be contrary to the stated objectives of the NTP. A potential gap exists in so far as the regulations are silent on the consequences of non-compliance with a safety licence. There appears to be a need for the Director to be empowered to take appropriate enforcement action in the case of non-compliance, which may vary in nature depending upon the severity of the contravention. Such powers will become increasingly important, once steps are taken to commercialize and possibly privatize airports.

4.3.2 Aerodrome services

- C The regulation of aerodrome charges runs counter to the anticipated commercialization of some aerodromes, which would include permitting operators the freedom to set their own fees. By the same token, a portion of the revenue which a commercial aerodrome operator would generate would be derived from leasing of commercial and retail space to other air service providers, eg aircraft maintenance companies, catering companies and baggage handling services, etc. Within such a context it would be inappropriate for the Director to retain the power to set conditions under which such services may be rendered and to specify the charges for such services.
- C Within a commercialized environment, it may be appropriate to provide for the establishment of facilitation committees comprising of representation from the airport operator, various airport users and the Directorate: Civil Aviation.

4.4 RECOMMENDATIONS

4.4.1 Aerodrome safety

IT IS RECOMMENDED THAT:

- C AN Reg 61 in respect of aerodrome licensing be amended to provide that the licensing

of any aerodromes is based solely on compliance with the applicable **safety criteria** as set out in the ICAO SARPs. In this regard, further refinements may be introduced providing for a **commercial** aerodrome operator to submit a safety plan which sets out how it complies with ICAO SARPs (including provisions for regular certification by the operator confirming such compliance, sporadic inspection by the DCA, etc).

- C The AN regs should further be expanded to lay down procedures to be followed in the event of **non-compliance** with a safety licence. Such procedures should provide for, the Director:
 - S issue a directive to an aerodrome operator requiring compliance with a licence condition;
 - S undertake an investigation into the alleged non-compliance with a licence condition;
 - S impose a penalty for as long as a condition is not complied with; or
 - S suspend or revoke a licence (after having provided the licensee and all interested parties the opportunity to present their case).

4.4.2 Aerodrome services

- C AN Reg 61(4) be repealed to the extent that commercial aerodrome operators should enjoy the **freedom** to establish their own **charges**, while other service providers at aerodromes should similarly be free to set charges.
- C Provision could be made for the establishment of **airport facilitation committees** (as provided for in the ICAO SARPs). The functions of such committees could entail:
 - S assist a commercial airport operator to provide a service targeted to the needs of its clients;
 - S improve understanding regarding the needs of airport users;
 - S advise a commercial airport operator regarding the utilization of airport land or facilities, including the expansion of airport infrastructure, an alteration in the use of airport infrastructure or the closure of airport infrastructure;
 - S collectively debate and make inputs concerning airspace management needs; and
 - S general facilitation functions.

5. AIR TRAFFIC AND NAVIGATION SERVICES

5.1 POLICY

The NTP adopts the policy objective to:

“establish where feasible .. autonomous authorities to operate and manage ... aviation equipment on commercial principles”.

5.2 STATUS QUO NARRATIVE

- 5.2.1 Air traffic and navigation services (ATNS) are currently provided by the Directorate: Civil Aviation and have been regarded until recently as a core government function. Planning is underway to commercialize components of the Directorate, including the provision of ATNS, by transferring these to an independent authority run along commercial lines.

Although commercialization cannot occur in terms of the AA, the PEPA provides that government departments, which would include the ATNS component of the Directorate: Civil

Aviation) may be commercialized.

The AA does not provide for the regulation of any ATNS charges.

5.3 STATUS QUO ANALYSIS

- 5.3.1 Currently there is no enabling framework to deal with the potential consequences of commercialization of ATNS. There is no indication as to how the Director will monitor adequacy of ATNS operations undertaken by a commercialised entity. The current Aviation (Air Navigation Charges) regulations presuppose payment of such charges to the government only and the level of charges are probably too low to support viable commercial ATNS.

5.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- C The Director be empowered to set minimum standards for ATNS (based on ICAO SARPs), which could entail **licensing**. The Director should be able to monitor compliance with minimum standards. Similarly, the legislation should provide for procedures to be followed in the case where standards are not complied with.
- C Legislation should further define the types of ATNS **charges** (eg en route and approach charges) which may be levied by an operator. At the same time, the principle that a commercial ATNS provider will have autonomy in setting charges should be entrenched.

6. REGULATORY SYSTEM

6.1 POLICY

- 6.1.1 In ensuring commercially fair, safe and environmentally-friendly aviation operations, the NTP adopts the following strategies:

“establish an independent unit to take on functions of aircraft accident investigation”
and

“strengthen the safety enforcement provisions of the Aviation Act.”

- 6.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to:

“develop a harmonized regional civil aviation policy in respect of ... the expansion and strengthening of Government's capacity” to monitor compliance with policy and legislation (article 9.2(d));

but goes further than the NTP in encouraging Member States to develop:

“... transparent, flexible, predictable and streamlined regulatory frameworks” (article 2.4(l))

6.2 STATUS QUO NARRATIVE

- 6.2.1 The previous discussion in this report has already highlighted various features of the **regulatory system** set out in the AA and regulations. The main characteristics of the current

system are the existence of two main regulators, namely the Minister and the Director of Civil Aviation (referred to alternatively as the Chief Civil Aviation Officer), each having a broad range of **regulatory instruments** and **mechanisms** at their disposal.

- 6.2.2 With regard to the investigation of **aircraft accidents**, it may be noted that this function currently falls under the Director. In terms of the Aviation (Investigation of Accidents) Regulations, the Director must appoint persons as inspectors of accidents, one of whom will be Chief Inspector of Accidents. The regulations grant an inspector various powers in order to conduct investigations, eg the power to issue summonses. Alternatively, the Minister may request the Chief Justice to appoint a commissioner to investigate an accident who should be a person qualified to be appointed as a judge under the Constitution. A commissioner has all the powers vested in the High Court to undertake an investigation.

6.3 STATUS QUO ANALYSIS

- 6.3.1 The current AA provisions appear not to accommodate the NTP objective of an “independent unit” for the investigation of aircraft accidents. Accident inspectors are government officials and presumably would not be regarded as “independent” in this context. Where a commissioner is appointed, the regulations depart from the assumption that such commissioner will perform in an independent and impartial manner. However, a commissioner is clearly a temporary appointee and not a standing “unit” able at all times to undertake investigations. Although the PEPA would enable the accident investigation section of the Directorate: Civil Aviation to be commercialized, it is not apparent that good economic reasons exist for such an approach. As an alternative, the perceived need for an independent unit could be met by empowering the Minister or Director to appoint an outside civil aviation expert to investigate accidents, as and when the need arises.

- 6.3.2 Taken collectively, the current regulatory system does not give effect to the regulatory policy thrust of the NTP and contains a number of potential **inconsistencies**:

- C regulatory discretion is **at times** based purely on **safety considerations** (eg. weighing of aircraft - AN Reg 14), while in **other cases** it may be based squarely on **economic criteria** (eg. granting of permits for international and domestic non-scheduled flights - ATL Reg. 24);
- C sometimes the regulator enjoys an **arms-length relationship** with the regulated entity (eg. the CCO’s power to validate the certificate of airworthiness of an aircraft issued under another state’s law - AN Reg 7(5)), at **other times** this is **not the case** (eg. Minister’s power to indirectly object against an application for a licence - ATL Reg 9);
- C sometimes regulatory decisions **support** each other (eg. Postmaster-General’s discretion in respect of mail - AA 15, compared with stipulated licence conditions - ATL 6(3)(b)), in **other cases** they may potentially **conflict** (eg. CCO’s powers under AN Reg 56 compared with Minister’s power under ATL 18 and Director’s power under ATL 27);
- C sometimes an **enquiry** must precede a regulatory decision (eg. CCO’s power under An Reg 56), while at **other times** this is **not required** (eg. Director’s power under AN Reg 61);
- C some regulatory processes involve the public (eg. Gazetting of licence and permits applications - ATL 8 and 26(2)), in **other cases** the public is not involved (eg licensing of private aerodrome - AN Reg 61);
- C sometimes the **rules of administrative justice** are observed (eg. hearings by a tribunal under ATL Reg 12), at **other times** they are **ignored** (eg. objections under

ATL Reg 9);

- C sometimes the regulator must supply **reasons** (eg. Publication of Minister's decisions under ATL Reg 17), in **other cases** this is not required (eg CCO's decision under AN Reg 56; and
- C **sometimes regulators must consult** important stakeholders (eg. Minister's consultation of Minister of Land - AA 4(h)), in **other cases no consultation** is necessary (Director's power to permit expansion of aerodrome - AN Reg 61(4))

6.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- 6.4.1 The AA be amended to empower the Minister or Director to contract out the investigation of serious accidents (ie loss of life or serious injury) where necessary, to a civil aviation expert or experts, not in the employ of the government.
- 6.4.2 The AA and its attendant regulations be amended as a whole by folding in a consistent regulatory approach which responds to the NTP and, in particular, to the following:
 - C mechanisms to ensure that regulators consistently take unbiased decisions, particularly where an arms-length relationship is not evident;
 - C mechanisms to consistently encourage accountability on the part of the regulator;
 - C mechanisms to ensure that regulatory decisions are mutually supportive;
 - C clear criteria for the taking of decisions that conform with the main thrusts of public interest regulation;
 - C streamlined and transparent regulatory processes for each regulatory aviation issue;
 - C consistent indication of the measures to be taken prior to the exercise of a regulatory discretion (eg. inquiries, investigations, audits, hearings, etc.);
 - C a consistent approach to what each regulatory measure entails; and
 - C a cut-across obligation to involve stakeholders and users in the regulatory process through, eg consistent obligations to publish decisions, carrying out consultations; etc.